No. 93-70

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS CURIAE

National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 2700 member companies are engaged in the full spectrum of waste management services. NSWMA's members include collectors and transporters of solid and hazardous waste, operators of solid and hazardous waste treatment, storage, and disposal

facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. A popular means of accomplishing this purpose is to impose discriminatory taxes and fees on disposal of out-of-state waste. Because such measures necessarily obstruct the interstate movement of waste, NSWMA's members are directly and adversely affected by such provisions. They accordingly have a strong interest in presenting their views on the constitutionality of the waste disposal fee at issue in this case.[1]

ARGUMENT

THE CONSTITUTIONALITY OF DISCRIMINATORY DISPOSAL FEES IS AN ISSUE OF TREMENDOUS PRACTICAL IMPORTANCE TO THE WASTE INDUSTRY

Prior to the decision of the Oregon Supreme Court in this case, it was settled that the Commerce Clause prohibited the States from imposing waste disposal charges that varied with the waste's state of origin. Fees that imposed a greater burden on interstate commerce would be permissible only if the State could show that some difference in the composition of the out-of-state waste resulted in disposal-related costs

[1] Letters from the parties consenting to the filing of this brief have been submitted to the Clerk of this Court. See Rule 37.2.

higher than the costs associated with waste generated within the State. No State had ever carried that burden.

That was the rule applied by this Court a little more than one year ago in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), and that was the rule applied by lower courts in the wake of *Chemical Waste Management*. *See Government Suppliers Consolidating Services v. Bayh*, 975 F.2d 1267, 1283-1284 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993); *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725, 735 (M.D. Ga. 1992); see also *National Solid Wastes Management Ass'n v. Voinovich*, 959 F.2d 590 (6th Cir. 1992).

The Oregon Supreme Court reached a sharply different conclusion in this case. It severely limited the reach of this Court's decision in *Chemical Waste Management* by holding that fees tied to the value of services provided by a State or costs incurred by it are valid under the Commerce Clause even if such fees are imposed *solely* on interstate commerce. Thus, even if the costs incurred by the State for each ton of interstate waste are the same as those associated with a ton of in-state waste, the State may require interstate commerce to "pay its own way" while exempting intrastate commerce from the burden of compensating the State for the very same costs. In upholding the Oregon statute on that basis, the Oregon court adopted a legal rule that the Seventh Circuit had squarely rejected when that court invalidated on Commerce Clause grounds an Indiana statute virtually identical to the Oregon law. *See Government Suppliers Consolidating Services v. Bayh*, 975 F.2d at 1283-1284.

The certiorari petition sets out in detail (Pet. 12-20) the flaws in the Oregon Supreme Court's legal analysis. Our purpose in filing this amicus brief is to explain to the Court the importance of the issue to our industry. Interstate movements of waste are necessary to the safe and efficient disposal of waste, but political and economic pressures in

importing states combine to favor imposition of disproportionate financial burdens on waste generated outside the state. The Oregon decision rips a loophole in the well-settled Commerce Clause prohibition against such discriminatory measures. Indeed, the decision below threatens to recreate the very uncertainty over the constitutional principles governing state waste disposal fees that led this Court to grant review in *Chemical Waste Management*. The Court should act now to clarify the Commerce Clause standards applicable to state-imposed user fees.

A. Discriminatory Waste Disposal Fees Have Been A Particular Focus Of State Interest.

This country generates over 180 million tons of municipal solid waste and over 240 million tons of hazardous waste each year. *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 4, 80 (1991) (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency) ("*House Hearings*").[2] While most of this waste is disposed of within the State of generation, a considerable portion -- approximately 15 million tons of municipal solid waste and 4 million tons of hazardous waste -- moves in interstate commerce. *House Hearings* at 81; NSWMA, *Interchange of Hazardous Waste Management Services Among States* 15 (Dec. 31, 1990) ("*Hazardous Waste Study*").

[2] Municipal solid waste is defined generally as "residential[] and commercial solid waste generated within a community." 40 C.F.R. § 241.101(k). Hazardous wastes are those solid wastes that may "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5)(B).

Moreover, the vast majority of States participate in this interstate market. A NSWMA study of municipal solid waste disposal found 133 different waste "interactions" among the lower 48 States and the District of Columbia, with each interaction reflecting a regular movement of waste between two jurisdictions. More than two-thirds of the States participate in this interstate market as both importer and exporter. *House Hearings* at 263, 290-291 (statement of Allen Moore, President, NSWMA). With respect to hazardous waste, all 50 States export some waste for treatment and disposal and 48 States import waste for those services; the average State sends waste to 19 other States for treatment and disposal. *Hazardous Waste Study* at 8, 10.

This interstate commerce exists because -- as is the case with other sectors of the economy -- only a mutually interdependent, nationwide system can provide the safest and most efficient waste disposal. Many of the Nation's population centers overlap two or three States. An out-of-state facility thus is often the closest and most cost-effective disposal option for many communities' municipal solid waste. Also, some communities may be too small to support a state-of-the-art disposal facility by themselves. Only by combining with other communities (both within and without the State) can they provide the volume needed to make a facility cost-justified. *House Hearings* at 258-259 (Moore).[3]

The same is true with respect to hazardous waste treatment and disposal. As the United States observed in its amicus brief in *Chemical Waste Management* (at page 8 (footnote omitted)),

[3] This is especially true given the strict federal regulations applicable to municipal landfills (*see* 40 C.F.R. Part 258), which are bound to increase significantly the cost of building and operating these facilities.

> [g]iven the nature of the hazardous waste management industry, * * * interstate transactions are inevitable. * * * Some wastes are generated in such small amounts that it is impractical to require a facility to treat or dispose of them in every State in which they are generated, or even in most States. In many cases, treatment or disposal facilities are so capital intensive that their economic viability depends upon the fact that there are only a few of them in the country.

Although well justified by considerations of safety and efficiency, these interstate movements of waste have proven to be a tempting target for discriminatory state taxation and regulation. As this Court has observed, the Commerce Clause ensures that "[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste Management*, 112 S. Ct. at 2012 (footnote omitted). But, as this Court's docket alone illustrates, a number of States have tried in recent years to isolate themselves from the problem of disposing of our nation's waste. *See Chemical Waste Management*, *supra*; *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); *C & A Carbone, Inc. v. Clarkstown*, cert. granted, No. 92-1402 (Feb. 24, 1993). The cases in the lower courts document a virtual epidemic of measures that discriminate against interstate commerce in waste.[4]

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[4] *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *In re Southeast Arkansas Landfill*, 981 F.2d 372 (8th Cir. 1992); *Government Suppliers Consolidating Services v. Bayh*, *supra*; *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993); *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, *supra*; *Northeast Sanitary Landfill, Inc. v. South Carolina Dep't of Health & Environmental Control*, No. 3-90-2296-17 (D.S.C. Jan. 3, 1992); *Medical Waste Assocs. Ltd. Partnership v. Mayor and Counsel of the City of Baltimore*, No. S 91-1547 (D. Md. Aug. 29, 1991); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991); *BFI Medical Waste Sys., Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991), *aff'd in part*, 977 F.2d 587 (9th Cir. 1992); *Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990); *County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 5, 1990); *Browning-Ferris, Inc. v. Anne Arundel County*, 438 A.2d 269, 271-272 (Md. 1981); *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, 495 A.2d 49 (N.J.), cert. denied, 474 U.S. 1008 (1985); *City of Elizabeth v. State of New Jersey Dep't of Environmental Protection*, 486 A.2d 356, 361 (N.J. Super. Ct. App. Div. 1984); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 417 N.E.2d 74 (N.Y. 1980).

Prior to this Court's decision in *Chemical Waste Management*, discriminatory taxes and fees had been a particular focus of state interest, presumably because they presented an opportunity to augment revenues by imposing a financial burden on out-of-state waste generators. Indeed, a 1992 survey found *14 States* contemplating such discriminatory fees. NSWMA, *Federal/State Issues Under RCRA* 1-11 (Jan. 1992).

These discriminatory laws, of course, have the effect of thwarting the safe and efficient disposal of waste by discouraging interstate movements of waste that -- as we have discussed (*see* pages 5-6, *supra*) -- are necessary in order to best accomplish those ends. They also may increase tensions among the States, precisely what the Commerce Clause was designed to prevent.

When this Court rendered its decision in *Chemical Waste Management*, reversing the Alabama Supreme Court decision that had upheld the discriminatory fee at issue in that case, the strict legal standard applicable to such discriminatory measures was made very clear. *See Chemical Waste Management*, 112 S. Ct. at 2014 ("[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"). That no doubt deterred States from enacting these laws. As we next discuss, however, the Oregon Supreme Court's decision -- which takes a very narrow view of the scope of *Chemical Waste Management* -- has again muddied the governing legal principles and threatens to stimulate another wave of discriminatory state legislation.

B. The Oregon Decision Creates Intolerable -- And Unjustified -- Uncertainty Regarding The Scope Of This Court's Ruling in *Chemical Waste Management*.

This Court held in *Chemical Waste Management* that a waste disposal fee applicable only to interstate waste violated the Commerce Clause because the State could not "'justify [the discriminatory measure] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" 112 S. Ct. at 2014 (citation omitted). In the Oregon Supreme Court's view, that standard does not apply to user fees; as long as the fee is justified by reference to the costs incurred by the State, discrimination against interstate commerce is entirely permissible.

The inevitable result of that drastic narrowing of the *Chemical Waste Management* ruling will be a rush by other States to adopt discriminatory cost-based disposal fees. (Indeed, as discussed above, one State -- Indiana -- previously had adopted an identical statute.) Because only interstate commerce will be required to bear the "costs," however, it is

likely that States will attempt to inflate those numbers to the greatest degree possible. For example, Alabama could reenact the $72 per ton fee on out-of-state hazardous waste invalidated in *Chemical Waste Management* as a "cost-justified" fee, pointing to the State's administrative costs and the potential costs to Alabama in the event of a release of hazardous substances into the environment. In the wake of the Oregon court's decision, state legislators could argue that the Commerce Clause imposes few limits on their authority in this area.

Lawsuits will inevitably follow and courts will be required to choose between competing legal standards -- upholding the law under the rule adopted by the court below or striking it down under *Chemical Waste Management* pursuant to the reasoning applied by the Seventh Circuit in *Government Suppliers Consolidating Services v. Bayh*, 975 F.2d at 1283-1284.

There simply is no reason to allow such confusion to take root. This Court should make clear now that its ruling in *Chemical Waste Management* applies to all state exactions -- user fees as well as taxes.

* * * * *

We have focused in this brief on the effect of the decision below on the waste industry. As the petition observes, however, the Oregon Supreme Court's rationale is not limited to the waste context. Cost-based fees can be and are imposed by States in all sectors of the economy. Thus, rather than describing the entire effect of the Oregon court's decision, this brief in actuality provides an in-depth look at one small facet of the confusion wrought by that ruling. This Court should grant the petition for a writ of certiorari in order to make clear that discriminatory user fees, like discriminatory taxes, violate the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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